ORIGINAL

Before The
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies	)	ET Docket No. 92-9

To: The Commission

COMMENTS OF CENTURY TELEPHONE ENTERPRISES, INC.

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Summary

Century Telephone Enterprises, Inc. ("Century") hereby submits its comments in response to the Commission's Notice of Proposed Rule Making, FCC 92-20, released February 7, 1992 ("NPRM").

Century is a publicly-traded corporation whose operating subsidiaries are engaged primarily in the provision of landline telephone service and cellular radio service.

The Commission's decision, as set forth in the NPRM, to grant applications filed after January 16, 1992 on a secondary basis is indefensible as a matter of policy and of law. The Commission's interim policy is beyond the Commission's authority under the Administrative Procedure Act and effectively amends Section 21.100(a) of the Rules. Moreover it will place an undue hardship on the communications common carrier industry at a time when the industry needs 2 GHz band frequencies while in the throes of cellular expansion. The Commission's fears and concerns in adopting the interim policy are largely overstated and, in any event, there are viable alternatives in allowing the Commission to achieve an orderly transition to the emerging technologies.

Co-primary status for existing and future 2 GHz band users would promote the efficient use of the radio spectrum. In many sections of the country (especially in non-urban areas) there may be sufficient capacity in the affected portions of the band to

accommodate both existing and future point-to-point users as well as new Personal Communication Service ("PCS") and other emerging technology ("ET") licensees. In addition, reallocation of government spectrum to the new services would reduce the costs incurred by PCS and other ET licensees to acquire sufficient spectrum for the operation of their systems.

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COMMENTS OF CENTURY TELEPHONE ENTERPRISES, INC.

Century Telephone Enterprises, Inc. ("Century"), by its attorneys, hereby submits its comments in response to the Commission's Notice of Proposed Rule Making, FCC 92-20, released February 7, 1992 ("NPRM").[1] In support hereof, the following is shown:

Statement of Interest

1. Century is a publicly-traded corporation whose operating subsidiaries are engaged primarily in the provision of landline telephone service and cellular radio service.

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[1] On March 20, 1992, Century filed with the Commission a petition requesting reconsideration of the NPRM insofar as it mandates that applications filed after January 16, 1992 (i.e., after the adoption date of the NPRM) for fixed operation in the 2 GHz bands involved, will be granted only on a secondary basis, conditioned upon the outcome of this proceeding.

Century's subsidiaries operate in the states of Arizona, Arkansas, Colorado, Idaho, Indiana, Iowa, Louisiana, Michigan, Minnesota, Mississippi, New Mexico, Oklahoma, Tennessee, Texas and Wisconsin. During 1991, Century's cellular subscribership increased by 44% and it is expecting approximately the same growth in 1992. Century utilizes microwave radio facilities in both its landline telephone and cellular radio operations. With respect to the operation of Century's cellular systems, microwave radio facilities are used to connect the various cellular base stations to the Mobile Telephone Switching Office (a common practice in the cellular industry). The majority of these microwave facilities are in the 2 GHz band. With the start-up of Century's cellular RSA operations and the expansion of its MSA facilities, new cellular sites are now being added at a rapid pace. As each new cell site is added, Century is reviewing the economic feasibility of incorporating it in the existing microwave system. Accordingly, the Commission's decisions in this proceeding will have a significant impact on Century's plans for both the immediate future and beyond; and Century clearly has an interest in any Commission action affecting use of the 2 GHz band.

The Commission's Decision To Grant Applications Filed After January 16, 1992 On A Secondary Basis Is Indefensible As A Matter Of Policy And Of Law

2. In the NPRM, the Commission has proposed to reallocate spectrum in the 1.85 to 2.20 GHz band for use by

Personal Communication Service ("PCS") systems and other emerging telecommunications technologies. As an initial matter, Century applauds the Commission's efforts (as reflected in the NPRM) to provide suitable frequency spectrum, in an expeditious manner, for this purpose. However, for the reasons set forth below, Century is constrained to take issue with the Commission's interim policy for treating 2 GHz applications filed after the January 16, 1992 adoption date of the NPRM. In Century's opinion, rescinding the policy or modifying it as suggested herein will still allow the Commission to achieve its stated goals without delaying the rule making or the implementation of PCS and other new technologies.

3. The Commission's intent (as stated in the NPRM) is to reaccommodate the 2 GHz licensees in a manner that is the most advantageous for these existing users, least disruptive to the public and most conducive to the introduction of new services.[2] To this end, the Commission has proposed (and has solicited public comment on) a transition plan consisting of three basic elements. The first element, as set forth in Paragraph No. 23 of the NPRM, is to grant applications filed after January 16, 1992, for fixed operation in the 2 GHz bands involved, on only a secondary basis and conditioned on the outcome of this proceeding. For the reasons set forth below,

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[2] NPRM at Para. No. 22.

this element of the transition plan is indefensible as a matter of policy and as a matter of law.

4. As noted in Paragraph No. 1 above, Century has immediate plans to expand its existing network of microwave facilities to accommodate the immediate and projected needs of its various cellular systems. These plans cannot be put on hold pending the outcome of this proceeding without paralyzing Century's system expansion activities and jeopardizing the quality of its service to the public.[3] As an example, Century had plans to upgrade its microwave network in Michigan and to move the existing radios to new cell site locations where new microwave systems are planned. The microwave radios in Michigan have only been in place a little over two years and have not nearly been fully depreciated. Unless the Commission's decision on secondary-basis grants is reversed or modified, Century will effectively be unable to reuse these radios and will suffer substantial financial losses because the resale market for fixed radio equipment in the 2 GHz band will disappear.

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[3] Presumably, other cellular carriers using 2 GHz band point-to-point microwave facilities are similarly situated. It is a common practice in the cellular industry to use common carrier point-to-point microwave radio facilities in the affected 2 GHz bands to connect the various cell sites to the system's Mobile Telephone Switching Office. As a general proposition, cellular carriers operate in a dynamic competitive environment which regularly requires the construction of new cell sites to increase the systems' depth and breadth of coverage for the provision of improved service.

5. Since the NPRM in this proceeding was released on February 7, 1992 and not published in the Federal Register until February 19, 1992, there was no advance warning of this policy determination. While the term "secondary basis" is not defined anywhere in the NPRM, the traditional definition would require secondary-status licensees to give way to primary licensees in the event of an electrical interference conflict. This would mean that an "emerging technology" ("ET") licensee could force the secondary user off the air without compensation if the secondary user caused interference to the ET licensee. Thus, in addition to discouraging further applications in the 2 GHz band, the Commission's action amounts to a virtual "freeze" on new applications pending the outcome of this proceeding. No communications common carrier will want to make the substantial investment required in establishing a fixed microwave system in the 2 GHz band with the knowledge that its facilities may be subjected to harmful interference without recourse and may have to be removed from service on short notice without just compensation.

6. The Commission's policy determination came without advance notice and without the opportunity for public comment. As such, the Commission's action violates the notice and comment requirements set forth in Sections 553(b) and (c) of the Administrative Procedure Act (APA). The Commission's interim policy of making secondary grants only, pending the

outcome of this proceeding, effectively rewrites Section 21.100(a) of the Commission's Rules which assures licensees in the Point-to-Point Microwave Radio Service that frequency assignments will be made only on an interference-free basis and that grantees will receive exclusive grants in each service area. The interim policy, on the other hand, would allow the Commission to make grants subject to the grantee receiving harmful interference. While the Commission is free to change this regulation, it may not do so without providing adequate advance notice and allowing public comment,in accordance with Sections 553(b) and (c) of the APA, and only then after weighing the comments and articulating the basis for the change. In this instance, the Commission has effectively amended Rule Section 21.100(a) but has cited no authority for failing to comply with the APA. Generally, when the Commission changes one of its Rules without notice and the opportunity for comment, it cites one or more of the exceptions in Section 553 of the APA for its actions. None is cited here.

7. The only clues to the Commission's rationale appear in Paragraph No. 23 and footnote 20 of the NPRM, where the Commission appears to be motivated by the desire "to discourage possible speculative fixed service applications for [the 2 GHz] spectrum" (NPRM at Paragraph No. 23) and to preclude "windfalls for the incumbent 2 GHz licensees" during

market-based negotiations with the would-be ET licensees (footnote 20). Thus, the Commission apparently sought to balance the future interests of prospective ET licensees against the immediate interests of telephone and cellular carriers; and the interests of the latter (who have an immediate need to use the 2 GHz spectrum for the provision of service) were outweighed by the needs of the former (who have no present need for the spectrum at all).

8. While Century recognizes the need for an orderly transition if the proposed segment of the 2 GHz band is ultimately selected for the new technologies, it submits that the decision to make only secondary grants, pending the outcome of this proceeding, unfairly discriminates against existing telephone and cellular carriers. Moreover, the Commission's stated justification for this interim policy determination -- the need to discourage speculative filings and to protect the would-be ET licensees from unscrupulous incumbent licensees seeking windfalls -- is badly misplaced and overlooks reality. Existing carriers applying now for new facilities in the affected portion of the 2 GHz band are motivated by the need to accommodate their existing and planned service requirements, not by a desire to profit from the resale of the spectrum to some future ET licensee. For example, as noted in footnote No. 3 above, cellular carriers operate in a dynamic competitive environment which regularly

requires the construction of new transmission facilities to increase the depth and breadth of coverage of the licensee's system for the provision of improved service.

9. Additionally, in the mobile services, an applicant proposing a high-power station with a high-elevation, omnidirectional antenna is able to tie up a frequency for a radius of perhaps 70 miles or more. In contrast, Part 21 of the Commission's Rules, governing applications in the common carrier Point-to-Point Microwave Radio Service, generally permits only low-power stations with narrow beamwidth antennas transmitting along clearly defined paths of relative short distance. Thus, even from a practical engineering standpoint, the likelihood of a speculative filing tying up a significant amount of 2 GHz spectrum over a substantial geographic area is regarded as remote. Accordingly, there is little likelihood of a substantial number of speculative filings pending the outcome of this proceeding. Moreover, in the event some speculative filings should occur, there are other safeguards the Commission may employ to preclude the grantees from seeking windfalls from prospective ET licensees. And even if some few unscrupulous incumbent licensees attempt to take undue advantage of ET licensees during market-based negotiations, the mere possibility of that coming to pass in isolated instances is insufficient to outweigh the interests of telephone and cellular carriers who have an immediate need

for 2 GHz spectrum and who will be severely inconvenienced and their subscribers disserved by secondary-status grants.

10. Century accordingly submits that the Commission's fears and concerns about speculative filers and windfall seekers are largely unfounded and that secondary-basis grants are unnecessary to achieve the Commission's goals. If the Commission is not convinced, it can better preclude the prospects of mass speculative filings without disruption to the communications industry by reducing the present 18-month construction period for new fixed microwave facilities in the 2 GHz band to, for example, 12 months and by instituting a tough policy of not granting extensions of time to complete construction except in the most compelling circumstances and only then when it is clear that no speculative motivation is present. If the Commission nonetheless feels that secondary grants are essential, then such secondary grants should be deferred for a reasonable period of time to allow filing plans in progress as of the release date of the NPRM to proceed without restriction. The January 16, 1992 cutoff date is unfair to Century and other similarly situated carriers whose 2 GHz plans were already in progress as of that date but who had not yet made application filings. This would more fairly balance the needs of existing carriers, whose plans would otherwise have to be changed substantially with concomitant in-service delays and additional financial outlays, all at the

public's expense, with the future interests of would-be ET licensees. By putting off the effective date for a reasonable period of time, 2 GHz filing plans already in progress could be implemented without the secondary-status stigma. Finally, if the Commission feels compelled to cling to the interim policy determination announced in the NPRM, it should exempt bona fide telephone and cellular carriers from secondary status grants.

Existing And Future Licensees Should Have Co-Primary Status And The Commission Should Study The Use Of Adjacent Government Spectrum

11. The Commission has also solicited public comment on a number of alternate proposals,[4] two of which have particular merit and, therefore, are particularly deserving of attention. The first alternative would allow all currently licensed 2 GHz fixed users (not only state and local government licensees) to continue to operate on a co-primary basis while permitting negotiations to use the spectrum. The second would require an assessment in the current proceeding as to whether and to what extent the possible availability of adjacent government spectrum might affect the market-based approach to the reaccommodation proposed in the NPRM. In this regard, the Commission has requested comment on whether the availability of a portion of the 1.71-1.85 GHz band for relocation would

[4] NPRM at Para. No. 27.

provide sufficient incentive in the transition process to eliminate the need to alter the incumbent 2 GHz operations to secondary status.

12. Century submits that the Commission should allow all currently licensed 2 GHz users (and future 2 GHz licensees) to continue to operate on a co-primary basis (while permitting negotiations to use the spectrum) following the licensing of PCS and other ET services. This will enable existing and future 2 GHz band point-to-point users (many of whom operate cellular systems in a dynamic and competitive market) to better plan their system design activities. Such action by the Commission in this proceeding would reduce the inconvenience and increased costs to subscribers that relocation would entail.

13. Co-primary status for existing and future 2 GHz band point-to-point users would also better promote the efficient use of the radio spectrum. At this moment in time, the extent of demand for PCS and other ET services on any newly-allocated channels is, at best, speculative. The definitive verdict will be rendered by the public once commercial PCS and other ET systems are licensed and placed into operation, which will not occur for a number of years. However, much of the demand for these services will be satisfied by existing cellular carriers who can today offer at least PCS (and possibly other

ET services as well) under Section 22.930 of the Rules, assuming the availability of type-accepted equipment. Thus, at least some of the identified public demand for these new services will be accommodated by both existing cellular carriers and new PCS and other ET licensees, actions that will lessen the need for 2 GHz band spectrum capacity for the provision of these services. As a result, in many sections of the country (especially in non-urban areas) there may be sufficient capacity in the affected portion of the 2 GHz band to accommodate both existing and future point-to-point users as well as new PCS and other ET licensees, thus rendering unnecessary the relocation of the existing and future point-to-point users. To require the relocation of existing and future point-to-point users in those geographic areas where the channels are not required to accommodate demand for the new services would waste scarce and valuable spectrum, a result that co-primary status would avoid.

14. In addition, Century urges the Commission to seriously study the availability of adjacent government spectrum for allocation to the new services. The Commission's staff study, entitled "Creating New Technology Bands for Emerging Telecommunications Technology," FCC/OET TS92-1 (January, 1992), prepared for this proceeding, did not consider any proposed reallocation of spectrum currently

assigned for Government use.[5] The reallocation of Government spectrum, if available, would have a positive effect upon the Commission's proposed market-based access approach. PCS and other ET licensees would be able to acquire this Government spectrum for a price substantially lower than the price they would be required to pay existing licensees to migrate to other frequency bands.

Conclusion

15. In conclusion, Century reiterates that it supports the Commission's goals in this proceeding and recognizes the need for an orderly transition process. However, the Commission's interim policy on secondary grants is beyond the Commission's authority under the APA. Moreover, it will place an undue hardship on the communications common carrier industry at a time when the industry needs 2 GHz frequencies while in the throes of cellular expansion. The Commission's fears and concerns in adopting the interim policy are largely overstated and, in any event, there are viable alternatives in allowing the Commission to achieve an orderly transition to the emerging technologies.

16. Co-primary status for existing and future 2 GHz band users would promote the efficient use of the radio spectrum.

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[5] NPRM at Para. No. 11, footnote 11.

In many sections of the country, there may be sufficient capacity in the affected portions of the band to accommodate both existing and future point-to-point users as well as new PCS and other ET licensees. In addition, reallocation of government spectrum to the new services would reduce the costs incurred by PCS and other ET licensees to acquire sufficient spectrum for the operation of their systems.

Respectfully submitted,

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